

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools,)	
)	
Complainants,)	Case No. 14-1182-EL-CSS
)	
v.)	
)	
FirstEnergy Solutions Corp.,)	
)	
Respondent.)	

**MOTION FOR INTERIM AND PRELIMINARY ORDERS AND MEMORANDUM IN SUPPORT
OF NAVCO ENTERPRISES.COM, INC., NAVCO ENTERPRISES OF P.V., INC., NAVCO
ENTERPRISES, INC., FOODLIFE INTERNATIONAL, INC., NAVCO ENTERPRISES OF O.V., INC.,
AND NAVCO OF YORK ROAD, INC.**

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July 21, 2014

ATTORNEYS FOR MOVANTS

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Ohio Schools Council, Ohio School Boards)	
Association, Ohio Association of School)	
Business Officials, and Buckeye Association of)	
School Administrators, dba Power4Schools,)	
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MOTION FOR INTERIM AND PRELIMINARY ORDERS OF NAVCO ENTERPRISES.COM, INC., NAVCO ENTERPRISES OF P.V., INC., NAVCO ENTERPRISES, INC., FOODLIFE INTERNATIONAL, INC., NAVCO ENTERPRISES OF O.V., INC., AND NAVCO OF YORK ROAD, INC.

Pursuant to R.C. 4928.10 and Rule 4901-1-12, Ohio Administrative Code, Navco Enterprises.Com, Inc., Navco Enterprises of P.V., Inc., Navco Enterprises, Inc., Foodlife International, Inc., Navco Enterprises of O.V., Inc., and Navco of York Road, Inc. ("Movants"), move the Public Utilities Commission of Ohio ("Commission") for orders providing the following preliminary and interim relief:

1. An order finding that an amount disputed by a Movant will not be deemed due and payable and the contract will not be deemed as in default if the Movant has notified FirstEnergy Solutions Corp. ("FES") that its invoice, or, in the case in which the Movant is billed through consolidated billing, a portion of the bill of the electric distribution utility or utilities ("EDU") related to the Competitive Retail Electric Service ("CRES") Customer Supply Agreement ("CSA") between FES and the Movant, is disputed;
2. An order finding that FES, pending the resolution of the billing dispute and during the balance of the term of the service agreement, shall take no action that may result in a Movant being required to pay for retail electric service in accordance with the

otherwise applicable Standard Service Offer (“SSO”) rate schedule or that may subject the Movant to SSO terms and conditions that may affect the opportunity for the Movant to obtain CRES from a CRES provider;

3. An order that FES will not seek to terminate service of a Movant for failure to pay any disputed amounts and that FES will refrain from terminating service for so long as there is no final determination that the disputed amount is due and payable, except that CRES will not extend beyond the stated term of the CRES Contract and any extensions agreed to by the parties;
4. An order that FES shall in good faith, verbally and in writing, attempt to resolve the dispute;
5. An order that FES shall not seek to impose a late payment charge on any amount disputed by a Movant;
6. An order that FES shall, for a Movant that receives a consolidated bill that includes an RTO Expense Surcharge that is disputed by a Movant (regardless of whether the Movant has withheld payment of the disputed amount) (1) notify in writing the EDU or EDUs serving the Movant that there is a dispute regarding FES’s right to bill and collect the amount or charge identified by the Movant as being in dispute and indicate, in such notice to the EDU or EDUs, that FES’s service relationship with the Movant is not and will not be altered as a consequence of the billing dispute; and (2) provide each Movant disputing the amount or charge with a copy of the notice provided to the EDU or EDUs;
7. An order that FES will not apply any prepayment, deposit, escrow, or other credit mechanism which a Movant may have provided to the disputed amount;
8. An order that FES will not revise its credit profile of a Movant or take any action that might alter a Movant’s credit profile for the sole reason that the Movant has disputed an amount or charge which FES has billed the Movant (either directly or through consolidated billing); and
9. Such additional orders as the Commission may find are just, reasonable and lawful.

Movants are supportive of and join the motion filed by The Timken Company, Marathon Petroleum Company, Wausau Paper Towel and Tissue LLC, ASHTA

Chemicals Inc., Columbus Castings, The Lincoln Electric Company, Delphi Corporation, and Landmark Plastic Corporation on July 17, 2014.

The grounds supporting this Motion are set out in the accompanying Memorandum in Support.

Respectfully submitted,

/s/ Frank P. Darr
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MEMORANDUM IN SUPPORT

In this Complaint, Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools (“Complainants”) are seeking orders that there are reasonable grounds for complaint and that FES committed unfair, misleading, deceptive, or unconscionable acts and practices and relief imposing civil forfeitures and the conditional suspension of FES’s certificate to provide CRES in Ohio. By this Motion, Movants seek preliminary and interim relief to assure that the moving parties are not adversely affected by actions of FES while billing matters, which are the subject of bona fide disputes, are resolved. Because the Commission’s rules do not address many of the potential problems of notice to EDUs and ongoing relationships between the Movants and FES, the requested relief is necessary and reasonable. Movants are

supportive of and join the motion filed by The Timken Company, Marathon Petroleum Company, Wausau Paper Towel and Tissue LLC, ASHTA Chemicals Inc., Columbus Castings, The Lincoln Electric Company, Delphi Corporation, and Landmark Plastic Corporation on July 17, 2014.

The specific relief the Movants seek includes the following orders:

1. An order finding that an amount disputed by a Movant will not be deemed due and payable and the contract will not be deemed as in default if the Movant has notified FES that its invoice, or, in the case in which the Movant is billed through consolidated billing, a portion of the bill of the EDU related to the CRES Contract between FES and the Movant, is disputed;
2. An order finding that FES, pending the resolution of the billing dispute and during the balance of the term of the service agreement, shall take no action that may result in a Movant being required to pay for retail electric service in accordance with the otherwise applicable SSO rate schedule or that may subject the Movant to SSO terms and conditions that may affect the opportunity for the Movant to obtain CRES from a CRES provider;
3. An order that FES will not seek to terminate service of a Movant for failure to pay any disputed amounts and that FES will refrain from terminating service for so long as there is no final determination that the disputed amount is due and payable, except that CRES will not extend beyond the stated term of the CRES Contract and any extensions agreed to by the parties;
4. An order that FES shall in good faith, verbally and in writing, attempt to resolve the dispute;
5. An order that FES shall not seek to impose a late payment charge on any amount disputed by a Movant;
6. An order that FES shall, for a Movant that receives a consolidated bill that includes an RTO Expense Surcharge that is disputed by a Movant (regardless of whether the Movant has withheld payment of the disputed amount) (1) notify in writing the EDU or EDUs serving the Movant that there is a dispute regarding FES's right to bill and collect the amount or charge identified by the Movant as being in dispute and indicate, in such notice to the EDU or EDUs, that FES's service relationship with the Movant is not and will not be altered as

a consequence of the billing dispute; and (2) to provide each Movant disputing the amount or charge with a copy of the notice provided to the EDU or EDUs;

7. An order that FES will not apply any prepayment, deposit, escrow, or other credit mechanism which a Movant may have provided to the disputed amount;
8. An order that FES will not revise its credit profile of a Movant or take any action that might alter a Movant's credit profile for the sole reason that the Movant has disputed an amount or charge which FES has billed the Movant (either directly or through consolidated billing); and
9. Such additional orders as the Commission may find are just, reasonable and lawful.

I. There is a bona fide dispute regarding an RTO Expense Surcharge between Movants and FES

On July 3, 2014, Complainants filed a multi-count complaint ("Complaint") in this proceeding. The Complaint alleges that certain of the Complainants' participating members are customers of Ohio EDUs and customers that receive CRES from FES, the Respondent in this proceeding.

Movants are also EDU customers and have received or are receiving CRES from FES pursuant to CSA's that contain provisions either identical to or substantially similar to the provisions described in the Complaint.

As more specifically described in the Complaint, FES has subjected or has threatened to subject Complainants' participating members to an extra charge (called an RTO Expense Surcharge) based on a claim by FES that it is entitled to pass-through certain costs which FES claims to have been billed by PJMPJM.

Similar to the Complainants, FES has subjected or has threatened to subject Movants to an RTO Expense Surcharge based on a claim by FES that it is entitled to

pass-through certain costs which FES claims that it has been billed by PJM. Based on Movants' information or belief, non-residential customers of FES that are located throughout Ohio are similarly situated to Movants and Complainants with regard to the general efforts by FES to bill and collect an RTO Expense Surcharge.

The Movants, individually, have, pursuant to the controlling CSA, disputed FES's right to bill and collect the RTO Expense Surcharge. Some Movants have also withheld payment of the disputed amount, in accordance with their right to do so under their CSA with FES. The Movants are current in their payments to both FES and their individual EDU or EDUs although they may have withheld or will withhold payment of the disputed amount of the RTO Expense Surcharge. Based on Movants' information or belief, once they have notified FES that they dispute FES's right to bill and collect the RTO Expense Surcharge, Movants and all similarly situated customers may withhold payment of the disputed amount pending the resolution of the dispute. Based on Movants' information or belief, once Movants or any similarly situated customers have properly withheld payment of the disputed amount, the disputed amount is not due and payable and is, therefore, not subject to late payment charges, penalties, or any other action by FES (or its billing and collection agents) that may be based on FES's RTO Expense Surcharge claim and may adversely affect the interests of Movants or similarly situated customers.

II. While the Complaint is pending, there is the potential for Movants and similarly situated parties to be adversely affected by actions of FES or their respective EDUs

As the dispute resolution process proceeds, there is potential for confusion and unintended consequences if there is no common understanding regarding such things as how the disputes affect FES's supply obligation to each Movant, EDU billings on behalf of FES that contain a disputed amount, and the potential for a Movant's return to

SSO service either as a result of FES's directions to an EDU or actions by an EDU that occur as a result of a lack of clarity about the significance of the dispute or how the EDU should exercise its billing and collection function in light of the billing dispute. These issues are not formally presented as matters for the Commission's consideration by the Complainants, but nonetheless are important to customers such as the Movants and similarly situated customers that have disputed the amounts that FES is seeking to collect through the RTO Expense Surcharge.

III. The Commission is authorized to issue the requested relief

The Commission has authority under R.C. 4928.10 to establish minimum service requirements. The section further provides that the Commission may adopt standards applicable to disconnection and termination of CRES including coordination between suppliers for purposes of maintaining CRES, the allocation of payments between suppliers when CRES components are jointly billed, and the specification of notice for early termination of CRES. The Commission has previously asserted authority to investigate matters arising out of the January 2014 weather events in a Commission-ordered investigation to determine if the practices identified in that proceeding were unfair, misleading, deceptive, or unconscionable.¹ The issues presented by the Commission for comment did not address the Commission's treatment of issues that may need to be addressed while billing disputes between FES and Movants are being resolved.

Pursuant to the authorization of R.C 4928.10, Rule 4901:1-10-15, OAC, provides that the electric utility may refuse or disconnect CRES to a nonresidential customer only

¹ *In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI, Entry (Apr. 8, 2014).

when the customer violates or fails to comply with the applicable electric utility contract or tariff. The rule prohibits termination of EDU services so long as the amounts owed the EDU are paid. As noted above, the Movants have paid or will pay current charges of the EDUs except that some of the Movants withheld or may withhold amounts that are disputed.

Pursuant to the authorization of R.C 4928.10, Rule 4901:1-10-31, OAC, provides that, if a portion of a bill or invoice is the subject of a bona fide dispute, payments in full of the undisputed amount of a bill or invoice under a consolidated billing shall be credited to the undisputed portion of the account and are not deemed partial payments for purposes of allocating a partial payment to a customer's bill for electric services that are billed on a consolidated basis. For those customers that are subject to consolidated billing, parties that have withheld payment in accordance with the rights under their respective contracts should be deemed current and the amounts should be applied appropriately to the CRES and EDU charges by the EDU.

Although Commission rules provide some guidance as to the treatment of billing related matters when there is a bona fide dispute between a customer and a CRES provider, the rules do not address matters of notice to the EDUs of disputed matters and do not address related matters such as credit issues. Because the Commission has the authority to address these issues pursuant to statute, the Movants request the Commission to issue interim and preliminary orders to assure that Movants are not adversely affected while they and FES address the bona fide billing disputes regarding the RTO Expense Surcharge.

While this Complaint is pending, it would be lawful and reasonable for the Commission to direct FES to treat the disputed amounts of the RTO Expense Surcharge as not due and payable, to avoid taking action that would terminate the contracts of Movants or that would otherwise result in the return of the Movants to the SSO during the remaining terms of their contracts with FES, to resolve the billing disputes in good faith, to prohibit FES from imposing a late fee on those amounts that are the subject to the bona fide dispute, and to prohibit FES from taking actions that adversely affect the business relationship between FES, third parties, and the Movants.

Additionally, the Commission should order FES to (1) notify in writing the EDU or EDUs serving a Movant that there is a bona fide dispute regarding FES's right to bill and collect the amount or charge identified by the Movant as being in dispute and indicate, in such notice to the EDU or EDUs, that FES's service relationship with the Movant is not and will not be altered as a consequence of the billing dispute; and (2) provide each Movant disputing the amount or charge with a copy of the notice provided to the EDU or EDUs.

For the reasons discussed above, the Commission should issue interim and preliminary orders providing for requested relief.

Respectfully submitted,

/s/ Frank P. Darr

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ATTORNEYS FOR MOVANTS

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion for Interim and Preliminary Orders of Navco Enterprises.Com, Inc., Navco Enterprises of P.V., Inc., Navco Enterprises, Inc., Foodlife International, Inc., Navco Enterprises of O.V., Inc., and Navco of York Road, Inc.* was sent by, or on behalf of, the undersigned counsel for Movants to the following parties of record this 21st day of July 2014, *via* electronic transmission.

/s/ Frank P. Darr

Frank P. Darr

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PLASTIC CORPORATION**

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Case No(s). 14-1182-EL-CSS

Summary: Motion for Interim and Preliminary Orders and Memorandum in Support of Navco Enterprises.Com, Inc., Navco Enterprises of P.V., Inc., Navco Enterprises, Inc., Foodlife International, Inc., Navco Enterprises of O.V., Inc. and Navco of York Road, Inc. electronically filed by Mr. Frank P Darr on behalf of Navco Enterprises.Com, Inc. et al.